



**The Comptroller General  
of the United States**

Washington, D.C. 20548

# Decision

**Matter of:** Mak's Cuisine  
**File:** B-227017  
**Date:** June 11, 1987

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## DIGEST

1. An amendment which incorporates into the invitation for bids the Anti-Kickback Procedures clause implementing the recently enacted Anti-Kickback Act of 1986, 41 U.S.C.A. §§ 51-58 (West Supp. 1987), is material since it imposes legal obligations on the contractor that were not contained in the original solicitation, and thus rejection of the bid as nonresponsive for failure to include acknowledgment of receipt of the amendment is proper.

2. A bidder's failure to acknowledge receipt of a material amendment renders the bid nonresponsive; the fact that the bidder may not have received the amendment until the day after bid opening is irrelevant where agency states it mailed amendment to bidders 3 weeks prior and in the absence of evidence that the failure to timely receive the amendment resulted from a deliberate attempt by the contracting agency to exclude the firm from the competition.

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## DECISION

Mak's Cuisine of Portland Oregon, protests the rejection of its low bid submitted in response to invitation for bids (IFB) No. DAKF57-87-B-0075, issued by the Contracting Division, Fort Lewis, Washington, for the procurement of noon meal service for armed forces applicants at military entrance processing stations in Portland. Mak's bid was rejected because it failed to timely acknowledge receipt of an amendment. Award of a contract under the IFB is being delayed pending our decision.

We deny the protest.

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The IFB was issued on February 19, 1987. Amendment 1, the only amendment to the solicitation, incorporated into the IFB the Anti-Kickback Procedures clause of the Federal Acquisition Regulation (FAR), § 52.203-7 (Federal Acquisition Circular 84-24, Feb. 6, 1987). This clause implements the Anti-Kickback Act of 1986 (Act), 41 U.S.C.A. §§ 51-58 (West Supp. 1987), and places numerous responsibilities on the contractor relating to preventing, detecting, reporting and compensating the government for kickbacks.

According to the contracting officer, Amendment 1 was mailed to potential bidders on March 2, 3 weeks prior to the March 23 bid opening. On that date, three bids were received. Mak's low bid was rejected as nonresponsive because Mak's failed to submit or acknowledge receipt of the amendment with its bid.

Mak's states that it did not receive the amendment until the day after bid opening. It signed and returned the amendment 2 days after its receipt in response to a telephone inquiry from Fort Lewis about the matter. Mak's argues that because the amendment does not relate to the price, quantity, or quality of the services procured, its failure to submit the signed amendment until after bid opening should be waived as a minor informality or irregularity under FAR, 48 C.F.R. § 14.405(d)(2) (1986). In addition, Mak's argues that the amendment does not change the legal relationship of the parties because Mak's was already legally obligated to observe the Act whether or not the regulation on which the amendment was based was specifically incorporated into the contract.

The Army argues that even if Mak's did receive the amendment after bid opening, this fact is irrelevant absent a showing that the failure to timely receive the amendment resulted from the deliberate attempt by the Army to exclude the firm from the competition. Project Engineering, Inc., B-222005, Feb. 25, 1986, 86-1 CPD ¶ 196. Moreover, citing our decision in 50 Comp. Gen. 11 (1970), the Army contends that because the amendment in question changes the legal relationship of the parties, and imposes additional obligations on the contractor, it is material, and therefore Mak's failure to sign and submit a copy of the amendment with its bid may not be waived as a minor informality or irregularity.

A bid that does not include an acknowledgment of a material amendment must be rejected because, absent such an acknowledgment, the bidder is not obligated to comply with the terms of the amendment, and thus its bid is nonresponsive. Great Lakes Dredge & Dock Co., B-213551, Dec. 13, 1983, 83-2 CPD ¶ 681. Even where, as here, an amendment may not have a

clear effect on price, quantity, or quality, it is nonetheless considered to be material where it changes the legal relationship between the parties, as, for example, if the amendment increases or changes the contractor's obligation or responsibilities. See Customer Metal Fabrication, Inc., B-221825, Feb. 24, 1986, 86-1 CPD ¶ 190; Reliable Building Maintenance, Inc., B-211598, Sept. 19, 1983, 83-2 CPD ¶ 344. The materiality of the amendment is not diminished by the fact that the amendment has little or no effect on the bid price or the work to be performed. Reliable Building Maintenance, Inc., B-211598, supra.

We find no merit in Mak's argument that the amendment did not change the legal relationship of the parties. Mak's states that it would have been legally obliged to observe the Act even if it did not acknowledge receipt of the amendment because even the unamended solicitation "prohibits illegal acts" and "kickbacks are illegal acts."

Mak's is correct in its understanding that it would be subject to the criminal penalties imposed by the Act, if it violated the Act, even if the solicitation or the contract did not contain the Act's provisions. However, the amendment in question does more than merely restate the criminal penalties of the Act. For example, the amendment requires the contractor to have in place and follow reasonable procedures to prevent and detect possible violations of the Act. In addition, the amendment requires the contractor to promptly report, in writing, to the Inspector General of the contracting agency, to the head of the agency or to the Department of Justice, any suspected violations of the Act. The amendment also allows the contracting officer to offset the amount of the kickback against any monies owed by the United States under the contract and to direct that the contractor withhold from sums owed to subcontractors, the amount of the kickback and pay that sum directly to the government, regardless of the contract tier at which a kickback was provided, accepted or charged. Finally, the amendment requires the contractor to include the substance of the Anti-Kickback Procedures clause in all subcontracts. The Army correctly points out that without the inclusion of these provisions, the contractor would not be contractually bound to do these things.

We therefore conclude that the amendment changed the legal relationship between the parties, and therefore was material and that Mak's failure to acknowledge it by the date of bid opening, in consequence, was a fatal defect in its bid which could not be waived by the contracting officer under FAR, 48 C.F.R. § 14.405(d)(2). Customer Metal Fabrication, Inc., B-221825, supra. This conclusion is not altered by the contention that Mak's received the amendment after bid

opening since there is no allegation and no evidence that Mak's alleged failure to timely receive the amendment resulted from the deliberate attempt by the Army to exclude Mak's from the competition. Project Engineering, Inc., B-222005, supra; Rawlings Mechanical Corp., B-215741, July 24, 1984, 84-2 CPD ¶ 107.

The protest is denied.

*Harry R. Van Cleve*

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